Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1057

IN THE

Supreme Court of the United States

October Term, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC., IN OPPOSITION

LOUIS A. HARRIS
1111 Third Avenue
Seattle, Washington 98101
(206) 625-6111

MARTIN M. LUCENTE
KIRK B. JOHNSON
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Burlington Northern Inc.

Merrill/Gunthorp-Warren, Chicago • 372-2600

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that the issues raised by petitioners relating to the Interstate Commerce Commission's order approving the merger of the Burlington Northern and the Frisco were barred by basic principles of *res judicata*?

2. Whether the Court of Appeals correctly concluded that the District Court did not abuse its discretion when it refused to vacate a judgment of dismissal to permit petitioners to amend their complaint to assert a new claim under the Land Grant Act of 1864, 13 Stat. 365?

TABLE OF CONTENTS

		PAGE
I.	QUESTIONS PRESENTED	i
II.	STATEMENT OF THE CASE	1
III.	ARGUMENT	5
	1. The Court of Appeals' Application of The Doctrine of Res Judicata Was Clearly Correct and Does Not Present Issues Appropriate for Review by This Court	6
	2. The Court of Appeals Correctly Concluded That The District Court Did Not Abuse Its Discretion When It Refused To Vacate A Judgment of Dismissal To Permit Petitioners To Amend Their Complaint	9
IV.	CONCLUSION	11

TABLE OF AUTHORITIES

PAGE

CASES:

Augspurger v. *Brotherhood of Locomotive Engineers*, 510 F.2d 857, 860 (8th Cir. 1975) . . 3

Brotherhood of Railway and Airline Clerks, Consolidated System Board of Adjustment 46 v. *Burlington Northern Inc.*, 513 F.Supp. 1023 (D. Minn. 1981) 2

Brotherhood of Railway and Airline Clerks v. *Burlington Northern Inc.*, 664 F.2d 294 (8th Cir. 1981) 3, 6, 9

Brotherhood of Railway and Airline Clerks, et al. v. *Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir., 1982) 4, 7

Burlington Northern Inc. — Control and Merger — St. Louis-San Francisco Railway Company, 360 ICC 788, 965-967 (1980) 2

Christophedes v. *Porco*, 289 F.Supp. 403, 408 (S.D. N.Y. 1968) 9

Kelsey v. *Minnesota*, 565 F.2d 503, 507 (8th Cir. 1977) 10

Missouri-Kansas-Texas Rail - Road Company v. *United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (May 26, 1981) 2

Sage v. Central R. Co., 99 U.S. 334 9

Terry v. Sharon, 131 U.S. 40 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1057

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC., IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are a number of railroad unions which have collective bargaining agreements with the former Burlington Northern Inc., now Burlington Northern Railroad Company (BN). BN is a common carrier incorporated in Delaware, and has its principal place of business in St. Paul, Minnesota.

In January, 1981, BN's Board of Directors authorized its management to proceed with formation of a holding company and subsequently informed its stockholders that the holding company proposal would be voted on at the company's annual meeting scheduled for May 14.

On April 30, 1981, petitioners filed suit in the U.S. District Court for the District of Minnesota and moved for a preliminary injunction barring formation of a holding company, transfer of assets from BN to any other corporation, or issuance of any securities, unless and until approval was obtained from the Interstate Commerce Commission (ICC). Petitioners alleged that such actions without ICC approval would violate Sections 11343-11345 of Title 49 and other provisions of the Interstate Commerce Act and would also violate the Merger Order in *Burlington Northern Inc. — Control and Merger — St. Louis-San Francisco Railway Company*, 360 ICC 788, 965-967 (1980), *aff'd sub nom., Missouri-Kansas-Texas Rail - Road Company* v. *United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (May 26, 1981).

In a decision rendered on May 14, 1981, the District Court concluded that the statutory sections cited by petitioners conferred exclusive jurisdiction on the Interstate Commerce Commission to redress alleged violations, and that petitioners could not initiate judicial proceedings for that purpose. With respect to petitioners' asserted right to enforce the Commission's order approving merger of the Burlington Northern and the St. Louis-San Francisco Railway Company, the District Court concluded that petitioners had failed to establish irreparable injury or a likelihood of success on the merits. *Brotherhood of Railway and Airline Clerks, Consolidated System Board of Adjustment 46* v. *Burlington Northern Inc.*, 513 F. Supp. 1023 (D. Minn. 1981).[1]

On appeal from the District Court's order, the Court of Appeals for the Eighth Circuit held that it lacked jurisdiction

[1] The holding company transaction was approved by Burlington Northern stockholders and was consummated on May 14, 1981.

over any of the subject matter and dismissed the appeal. *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (8th Cir. 1981.). The jurisdictional issues embraced all of the statutes ruled on by petitioners as well as the Burlington Northern-Frisco Merger Order. The Court relied in part on *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 857, 860 (8th Cir. 1975), which held that the doctrine of primary jurisdiction requires an agency to determine in the first instance whether its own order has been carried out, with subsequent judicial review of the agency's determination available to the petitioners.

Upon receipt of the mandate from the Court of Appeals, the District Court entered a judgment dismissing the action previously filed by petitioners.

Petitioners then sought vacation of the order of dismissal and leave to file an amended complaint which was denied by the District Court. The Court held that the order previously entered by the Court of Appeals had determined the issue of jurisdiction and that the order of dismissal merely responded to the Court of Appeals' prior ruling. The District Court stated that the petitioners' basic complaint was with the prior determination by the Court of Appeals regarding jurisdiction and that petitioners were merely attempting to reargue in the District Court the validity of the decision by the reviewing Court.

Petitioners appealed again to the Court of Appeals for the Eighth Circuit, claiming that the District Court's dismissal had deprived them of an opportunity to amend their complaint to assert a new claim under the Land Grant Act of July 2, 1864, 13 Stat. 365, and that petitioners' allegations regarding violations of the Burlington Northern-Frisco Merger Order stated a claim within the jurisdiction of the District Court. On November 18,

1982, the Court of Appeals, in a *per curiam* decision, held that the District Court had not abused its discretion when it refused to allow petitioners, after entry of a judgment against them, to amend their complaint to assert a new claim under the Land Grant Act. The Court of Appeals also held that petitioners were barred by basic principles of *res judicata* from continuing to litigate the issue of BN's compliance with the Frisco Merger Order. The Court of Appeals added that, in any event, it was convinced that its prior disposition of that issue was correct and did not warrant reconsideration.

In the meantime, petitioners were also seeking relief before the Interstate Commerce Commission. Concurrently with the initiation of the litigation in the District Court on April 30, 1981, petitioners sought an order from the Interstate Commerce Commission which would have barred formation of the proposed holding company unless and until approved by the Interstate Commerce Commission. Petitioners argued that the proposed holding company transaction violated (1) the Interstate Commerce Act; (2) the Commission's order authorizing the merger of the Burlington Northern and St. Louis-San Francisco Railway Company; and (3) certain restrictions in bonds issued by BN's corporate predecessors in 1896. In June, 1981, the Commission denied the petition, holding that the transaction in question did not violate the Act or the Burlington Northern-Frisco Merger Order, and that petitioners lacked standing to enforce the bond restrictions.

Petitioners sought judicial review of the Commission's decision, but in *Brotherhood of Railway and Airline Clerks, et al.* v. *Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982), the Court of Appeals affirmed the Commission's decision in virtually

all respects.[2] In particular, the Court specifically affirmed the Commission's conclusion that the holding company transaction did not violate the Frisco Merger Order. 671 F.2d at 1088. Petitioners did not seek review of the Court's decision.[3]

ARGUMENT

The petition for certiorari seeks review of the decision of the Court of Appeals filed on November 18, 1982. The *per curiam* decision of the Court held that the District Court did not abuse its discretion when it refused to allow petitioners, after entry of a judgment against them, to amend their complaint to assert a new claim under the Land Grant Act of July 2, 1864. The Court of Appeals also held that petitioners were barred by the doctrine of *res judicata* from raising again issues involving Burlington Northern's compliance with the Frisco Merger Order.

Neither of the issues resolved by the Court of Appeals involves matters appropriate for consideration by this Court on certiorari. Moreover, the decision of the Court of Appeals was clearly correct in all respects and does not warrant review by this Court.

---

[2] The Court remanded the case for further proceedings on the narrow questions of whether BN actually controlled several terminal and switching railroads at the time the holding company was formed, and if so, whether the ICC had jurisdiction over the holding company transaction. That issue is pending before the Commission.

[3] Shortly after initiating the described proceedings in the District Court and the Interstate Commerce Commission, petitioners also filed an action in the United States District Court for the Western District of Washington. The complaint in this third proceeding duplicated petitioners' allegations in the Minnesota action and also asserted claims under the Land Grant Act of 1864. *Citizens Committee to Save The Land Grant Railroads; Brotherhood of Railway and Airline Clerks, et al.*, No. C 81-566C (Wash. 1981). The District Court dismissed this action on December 30, 1981, and the matter is now on appeal before the Court of Appeals for the Ninth Circuit.

Petitioners seek certiorari on the basis of questions which are not in fact present. As the preceding statement and the following argument demonstrate, the issues as to which petitioners seek review were decided by the Court of Appeals in two previous decisions disposing of appeals by petitioners. In neither instance did petitioners seek review by this Court. Accordingly, the issues raised by the present petition are not now subject to review and would not in any event warrant exercise of this Court's certiorari jurisdiction.

1. The Court of Appeals' Application of The Doctrine of *Res Judicata* Was Clearly Correct and Does Not Present Issues Appropriate for Review by This Court.

In the proceedings before the Court of Appeals, petitioners argued that the action which had been dismissed by the District Court remained a viable proceeding to enforce compliance with the order of the Interstate Commerce Commission approving the Burlington Northern-Frisco merger. Petitioners recognized that the Court of Appeals had ruled against them on this issue in its prior decisions but urged that the Court had erred in this respect. In response to these contentions, the Court of Appeals held that, because petitioners had failed to seek further review of its prior orders, the doctrine of *res judicata* barred further litigation. The Court added that it considered its prior determinations correct in any event, even if it were disposed to review them as petitioners had requested.

An examination of the prior decisions by the Court of Appeals clearly demonstrates that the *res judicata* ruling was correct and properly disposed of petitioners' contentions.

In *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (1981), the Court of Appeals, citing the *Augspurger* case, held that petitioners' action seeking to

enforce compliance with the Frisco Merger Order was not within the subject matter jurisdiction of the courts, but was instead subject to the exclusive jurisdiction of the Interstate Commerce Commission. There simply is no other permissible reading of the Court's dismissal of petitioner's first appeal (A-12). As the District Court noted when it subsequently denied petitioners' motion to vacate its dismissal order:

> "Following the Eighth Circuit's clear ruling, nothing remained of the plaintiffs' complaint." (A-14)

It is also clear that petitioners did not seek review of that determination by the Court of Appeals, and that the issue was thus resolved on a final and binding basis by the Court of Appeals. Fundamental principles of *res judicata* clearly preclude further litigation of that issue by the petitioners.

The other prior decision of the Court of Appeals relating to compliance with the Burlington Northern-Frisco Merger order (*Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 671 F.2d 1085 (1982)) was rendered on review of the holding by the Interstate Commerce Commission that formation of the holding company did not violate the Burlington Northern-Frisco Merger Order.[4] The Court of Appeals concluded that

---

[4] Petitioners have recognized in the litigation instituted in the Western District of Washington that the decisions of the Court of Appeals have conclusively determined that petitioners cannot seek enforcement of the Burlington Northern-Frisco Merger Order in an independent judicial action. Thus, the complaint filed in the Western District of Washington duplicated petitioners' allegations in this case regarding non-compliance with the Commission's Order approving the Burlington Northern-Frisco merger. The District Court for the Western District of Washington dismissed those claims on the basis of the prior decision of the Court of Appeals. Although petitioners in the Washington litigation have taken an appeal from the Court's dismissal of the claims under the Land Grant statutes, they have not appealed from the dismissal of their claims regarding non-compliance with the Burlington Northern-Frisco Merger Order. Consequently, the District Court's dismissal of those claims in the Washington litigation is final and conclusive.

the Commission's interpretation of its own order was reasonable, 671 F.2d at 1088. Petitioners did not seek review of that determination and it thus became final and conclusive, again calling into operation fundamental principles of *res judicata*. Thus, in the course of this litigation, the Court of Appeals had previously ruled that petitioners' claims regarding Burlington Northern compliance with the Frisco Merger Order were not subject to the jurisdiction of the federal courts and had also ruled that those claims had been appropriately denied and found to be without merit by the agency with the exclusive authority to make that determination. In these circumstances, the Court of Appeals properly refused to reconsider its prior holdings and correctly applied the basic principles of *res judicata*.

Petitioners' statement of "Questions Presented" simply ignores these prior determinations and seeks to treat the most recent order of the Court of Appeals as the dispositive decision. Each of the questions argued by petitioners involves the propriety of resorting initially to the District Court for relief based on a claim of non-compliance with an ICC order approving a merger of interstate carriers. It is clear, however, that the substantive decisions on each of these questions were rendered by the Court of Appeals months before its decision of November 18, 1982, and that the time for seeking certiorari as to these prior decisions has expired.

The only possible limited exception is the question relating to *res judicata*. As the preceding discussion shows, the Court of

Appeals was correct in its application of that doctrine. Moreover, the issue thus resolved does not warrant the exercise of this Court's certiorari jurisdiction.[5]

2. The Court Of Appeals Correctly Concluded That The District Court Did Not Abuse Its Discretion When It Refused To Vacate A Judgment of Dismissal To Permit Petitioners To Amend Their Complaint.

As the preceding statement shows, petitioners' motion for leave to amend was filed subsequent to the entry of a judgment of dismissal by the District Court. The judgment of dismissal was clearly required by the mandate of the Court of Appeals following the decision of that Court in *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 492 (1981). As the District Court noted, "Following the Eighth Circuit's clear ruling nothing remained of the Plaintiffs' complaint" (A-14). In these circumstances, the matter of permitting an amended complaint was clearly committed to the sound discretion of the District Court and its decision should be overturned only on a showing of a gross abuse of that discretion. *Christophedes* v. *Porco*, 289 F.

---

[5] Petitioners' reliance on cases involving subsequent proceedings in a trial court following an interlocutory appeal is wholly misplaced (Pet. pp. 14-15). In the present case, the 1981 decision of the Court of Appeals regarding subject matter jurisdiction fully disposed of petitioners' claims for relief and effectively terminated the proceeding. Moreover, the Interstate Commerce Commission's determination that petitioners had failed to establish a violation of the Frisco Merger Order, affirmed on review by the Court of Appeals in early 1982, was rendered in a separate proceeding and consequently is not subject to review in the present case as an interlocutory determination. *Terry v. Sharon*, 131 U.S. 40; *Sage v. Central R. Co.*, 99 U.S. 334. In any event, the cases cited by petitioners merely recognize *this Court's* power to review prior interlocutory orders of lower courts which are involved in the decision under review. They do not require lower appellate courts to review their *own* prior determinations in the same or related proceedings in deciding an appeal.

Supp. 403, 408 (S.D.N.Y. 1968); *Kelsey* v. *Minnesota*, 565 F.2d 503, 507 (8th Cir. 1977). There is absolutely no basis for concluding that such an abuse of discretion occurred in this case.

It must be emphasized first that the order of dismissal had no effect on petitioners' rights to pursue in a separate proceeding any claims under the Land Grant statute of 1864 (as indeed they have done) because the dismissed complaint did not raise any issues pertaining to that statute. Accordingly, the District Court's discretion in the day-to-day management and control of its docket clearly permitted the determination that resurrection of the dismissed action should not be permitted and that leave to file an amended complaint should be denied.

In making this determination, the District Court could also properly take into account the fact that petitioners had already asserted their Land Grant claims in the proceedings pending before the United States District Court at Seattle, Washington. The multiplicity of actions which would have resulted from the proposed amended complaint fully justified the lower court's refusal to vacate the order of dismissal. In all respects, therefore, the Court of Appeals was correct in affirming the lower court's refusal to vacate the previously entered order of dismissal in order to permit the filing of an amended complaint. The order of the Court of Appeals thus presents no issues warranting review by this Court on certiorari.

CONCLUSION

The petition for writ of certiorari to review a decision of the Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

Louis A. Harris
1111 Third Avenue
Seattle, Washington 98101
(206) 625-6111

Martin M. Lucente
Kirk B. Johnson
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Respondent
Burlington Northern Inc.